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HUP CHEONG MOTOR CO.

v.

JONATHAN SAONG MAMAT & ANOR.

*b*HIGH COURT BORNEO
HAIDAR MOHD. NOOR J
[APPLICATION FOR EXECUTION NO. KG 22 OF 1990]
27 DECEMBER 1991

CIVIL PROCEDURE: *Interpleader summons - Property taken in execution pursuant to O. 17 r. 2, O. 74 r. 11 of the Rules of the High Court 1980.*

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CONTRACT: *Deed of assignment - Whether it is valid for a cash consideration made to the claimant - Whether it is an absolute assignment - Whether it was duly stamped under the Stamps Act 1949 (Act 378) - Admissibility.*

An interpleader summons dated 2 July 1991 was issued by the Court for the claimant to establish their claim to a Reconditioned Toyota Dyna Dump Truck taken in execution.

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The plaintiff disputed the claimant's claim and on 21 March 1991 the plaintiff's agents together with the bailiff of the Court seized the property which was in the claimant's possession in pursuance to a writ of seizure and sale taken out by the plaintiff. The claimant had paid the purchase price and import duties before the seizure took place.

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The issues before the Court were firstly, whether the alleged deed of assignment purportedly to assign the 1st defendant's right and benefits in respect of import permits for a cash consideration to the claimant is valid and secondly, whether the deed of assignment was duly stamped under the Stamps Act 1949 (Act 378).

Held:

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[1] As the deed of assignment is for valuable consideration, it is therefore a good assignment giving the claimant absolute ownership of the property. As such, the assignment is an absolute one and not a sham one as contended by the plaintiff.

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[2] By virtue of s. 52(1) of the Stamp Act 1949 instruments that are not duly stamped would be inadmissible. However, it is not an absolute prohibition but conditional on payment of a duty or penalty under ss. 43 and 47A of the said Act. As the deed of assignment does not fall under the categories mentioned in s. 47, it could be admitted in evidence in accordance with the proviso (a) to s. 52(1) on payment of a penalty of RM25 or 4 times the amount of the deficient duty.

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[3] The deed of assignment was impounded, the claimant was ordered to pay the penalty to the Registrar of the High Court who will send the sum together with the deed of assignment to the Collector of Stamp Duty for stamping. The property was ordered to be released to the claimant, costs to the claimant and stamping of the assignment in accordance with s. 53 must be done before the order is drawn.

[Order accordingly.]

Cases referred to:

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Nouvou Mont Dor (M) Sdn. Bhd. v. Faber Development Sdn. Bhd. [1985] CLJ (Rep) 231 (cit)
Hipparion (M) Sdn. Bhd. v. Chung Khiaw Bank Ltd. [1989] 1 CLJ (Rep) 41 (foll)
Malayan Banking Bhd. v. Agencies Service Bureau Sdn. Bhd. [1982] CLJ 217 (foll)

Legislation referred to:

Civil Law Act 1956, s. 4(3)
Rules of the High Court 1980, O. 17 r. 2, O. 74 r. 11
Stamp Act 1949 - First Schedule, ss. 2, 7(1), (2), (3), (5)
Stamp Ordinance 1949 (now Stamp Act 1949), ss. 43, 47A, 52(1), 53

Other source referred to:

Halsbury Laws of England (4th Edn.), Vol. 16, para. 1371

For the plaintiff - H.C. Lee; M/s. H.C. Lee Advocates

For the claimant - S.Y. Chan; M/s. Ee & Lim Advocates

JUDGMENT

Haidar Mohd. Noor J:

An interpleader summons dated 2 July 1991 (encl. 37) was issued by the Court for the claimant, Tan Brothers Trading Company, to establish their claim to a property taken in execution pursuant to O. 17 r. 2 and O. 74 r. 11 of the Rules of the High Court 1980. The notice was duly served on the plaintiff's solicitors. The plaintiff disputed the claimant's claim. The property taken in execution is in respect of a Reconditioned Toyota Dyna Dump Truck, Chassis No. BU 20-099302, Engine No. 0516419 ('the property').

On 21 March 1991 the bailiff of the Court together with the plaintiff's agents/servants pursuant to a writ of seizure and sale taken out by the plaintiff seized the property at the gate of the Kuching Port Authority after the customs duties were paid by the claimant. At the material time the property was in the possession of the claimant. Though the seizure was protested by the claimant's agent and their Mr. Liew, the seizure of the property was eventually allowed, apparently because of the order of seizure issued by the Court.

From the facts disclosed in this interpleader summons, there are two issues before the Court. The two issues are:

- (1) Whether the alleged deed of assignment ('LTK7') purportedly to assign the first defendant's right and benefits in respect of import permits No. A 90/1078, A 90/1079 and A 90/1080 for a cash consideration of RM45,000 to the claimant is valid.
- (2) Was LTK7 duly stamped under the Stamps Act 1949 (Act 378) ('the Act').

Issue (1)

According to LTK7, in consideration of the sum of RM45,000 which the first defendant acknowledged receipt, the first defendant *absolutely* assigned all his rights and benefits under the licence to import 15 units of Dump Truck to the claimant. It was specifically agreed that the claimant shall be fully responsible for all costs of importing the 15 units and for payment of customs duties and that the ownership of the 15 units to be imported shall be the claimant's absolutely. Since the assignment the claimant had already imported 8 units of the Dump Truck, 6 of which were imported before the date of the seizure of the property (see para. 8 of the affidavit of Mr. Liew Teck Kheng and Exhs. 'LTK13A' to 'LTK 18C'). As the approved permits were issued in the name of the trading firm of the first defendant, namely Malaysia Natural Resources, the imports of the 8 units were made by the claimant in the name of Malaysia Natural Resources as shown by the invoices and the import declaration forms (see Exhs. A and C). The purchase price for the units were paid by the claimant as agreed in LTK7 (see Exh. B). Payments of the import duties, as agreed, were paid by the claimant (see para. 10 of the affidavit of Mr. Liew Teck Kheng). Exhibits LTK 19A, B and C read with

a Exhs. 18C clearly show that import duty for the property was paid by the claimant before the seizure took place. All these were done in accordance with LTK7 and therefore the ownership of the property was with the claimant at the time of the seizure and would therefore appear not available to the plaintiff as judgment creditor for seizure thereof.

b From the facts deposed in the affidavits and the various exhibits annexed thereto I do not have reasons to doubt that LTK7 was an absolute assignment. The plaintiff merely contended that LTK7 is a sham. In considering whether LTK7 is an absolute one and not purporting to be by way of a charge under s. 4(3) of the Civil Law Act 1956, the case of *Nouvou Mont Dor (M) Sdn. Bhd. v. Faber Development Sdn. Bhd.* [1985] CLLJ (Rep) 231 is relevant for consideration where Seah, FJ said at p. 235:

c The assignment was in terms absolute in the sense that the assignor (appellant) intended to pass and transfer to the assignee (Public Bank) absolutely the beneficial interest as well as all the rights, title and interest in the sale agreement dated 1 April 1977 and the remedies of enforcing them. The instrument clearly purported and was intended in point of form, to be absolute assignment because of the use of the word ‘absolutely’ in Clause 1 thereof (see Fry LJ in *Comfort v. Betts* [1891] 1 QB at p. 740).

d Again in the case of *Hipparion (M) Sdn. Bhd. v. Chung Khiaw Bank Ltd.* [1989] 1 CLJ (Rep) 41 it was held that because of the word ‘absolutely’ used in the assignment, the assignment is an absolute one.

e As the assignment is for valuable consideration, it is therefore a good assignment giving the claimant absolute ownership of the 15 units of dump truck (including the property seized by the plaintiff) imported or to be imported under the approved permits on condition that all costs of importing and payment of the customs duties were paid by the claimant/assignee which is the case here. In this respect para. 1371 of *Halsbury Laws of England* (4th Edn.), Vol. 16 says:

f An assignment for valuable consideration of property to be afterwards acquired by the assignor, while it operates as a covenant to assign the property when acquired, and the beneficial interests passes as soon as the property is acquired by the assignor, does not take effect solely on contract, but confers an immediate interest on the assignee which is not affected by the assignor becoming bankrupt and obtaining his discharge before the property is acquired.

In the circumstances I am of the opinion that LTK7 is an absolute assignment and not a sham one as contended by the plaintiff.

Issue (2)

g A deed of assignment is an instrument chargeable with stamp duty as it falls under the first schedule of the Act (see item 12 read with item 32 of the said schedule). The stamp duty chargeable would appear to be RM10. The stamp of this amount was duly affixed on LTK7.

It would thus appear that LTK7 was duly stamped. Under s. 2 of the Act “duly stamped” is defined:

h As applied to an instrument, means that the instrument bears an adhesive or impressed stamp of not less than the proper amount and that such stamp has been affixed or used in accordance with the law for the time being in force in Malaysia.

In the case of Sabah and Sarawak the proviso even allows for “an official receipt for the proper amount may be affixed to any instrument in lieu of the stamp, and the instrument shall then be deemed to be duly stamped.

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It would appear that the claimant has duly complied with the provisions of s. 7(1) and (2) of the Act in respect of mode of paying and denoting duty chargeable.

However, I have next to consider whether s. 7(3) has been complied with. Section 7(3) reads:

7(3) Stamps used for any of the instruments described under any of the articles in the First Schedule and not included in the Second Schedule shall, and stamps used for any of the instruments described under any of the articles in the Second Schedule may, be cancelled as follows: The instrument, or the paper on which it is proposed to be written, shall be taken to the office of the Collector and the stamp shall there be cancelled by having the words "Stamp Office" with the name of the district and the date written or printed partly on the stamp and partly on the paper to which the stamp is affixed.

Section 7(3) thus prescribes the procedure for cancellation of a stamp on any instrument. From the facts disclosed it would appear that the claimant has not complied with the procedure prescribed in s. 7(3) and the compliance with the said procedure, it would seem to me, is mandatory as the failure to comply therewith would by s. 7(5) mean that such instrument would be deemed to be unstamped. Section 7(5) reads:

7(5) Any instrument bearing a stamp which has not been so cancelled in the manner prescribed in this section that it cannot be used again shall, so far as such stamp is concerned, be deemed to be unstamped.

In that event instruments that are not duly stamped, according to s. 52(1) of the Act would be inadmissible. Section 52(1), so far as is relevant reads:

52(1) No instrument chargeable with duty shall be admitted in evidence for any purpose by any person having by law or consent of parties authority to receive evidence or shall be acted upon, registered, or authenticated by any such person or by any public officer, unless such instrument is duly stamped:

Provided that:

- (a) any such instrument shall, subject to all just exceptions, be admitted in evidence on payment of the duty and the penalty, if any chargeable in respect thereof under s. 43 or s. 47A;
- (b) ...
- (c) ...

The effect of s. 52(1) of the Stamp Ordinance 1949 (now Stamp Act 1949) was considered by the then Federal Court in *Malayan Banking Bhd. v. Agencies Service Bureau Sdn. Bhd.* [1982] CLJ (Rep) 217. It would appear that under s. 52(1) except for certain types of instruments prohibition against admissibility of an instrument on account of not being duly stamped is not an absolute prohibition but conditional on payment of a duty or a penalty, if any, under s. 43 and s. 47A. In the present case the instrument is not a document which falls under the categories mentioned in s. 47 and that being the case, LTK could be admitted in evidence in accordance with proviso (a) to s. 52(1) on payment of a penalty of RM25 or four times the amount of the deficient duty, whichever sum be the greater under s. 47A of the Act. According to the case of *Malayan Banking Bhd., supra*, the Federal Court at p. 220 said:

If it appears to be unstamped the authority concerned has no choice but to impound the document and admit the same on payment of the necessary duty or penalty under proviso (a) to s. 52(1) and thereafter send the impounded documents to the Collector of Stamp Duty together with the duty or penalty for stamping under s. 53.

- a* The proper order I should make in this case is (a) the deed of assignment (LTK7) is impounded, (b) the claimant through their solicitor must pay the penalty of RM25 to the Registrar of the High Court who will send the sum together with LTK 7 to the Collector of Stamp Duty for stamping, (c) the property to be released by the Sheriff to the claimant (d) costs to the claimant and (e) the stamping of LTK7 in accordance with s. 53 must first be done before the order is drawn.

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Also found at [1992] 3 CLJ 1596

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